

**IN THE SUPERIOR COURT OF THE STATE OF DELAWARE  
IN AND FOR NEW CASTLE COUNTY**

**IN THE MATTER OF:**

**Fox Point Park Site  
Wilmington, Delaware**

**David S. Small, Acting Secretary,  
Department of Natural Resources and  
and Environmental Control of the State  
of Delaware,**

**Petitioner,**

**v.**

**New Castle County,**

**Respondent.**

**CIVIL ACTION NO.**

**Proceeding Under Sections  
9105, 9107, and 9112 of the  
Delaware Hazardous Substance  
Cleanup 7 Del. C. Chapter 91.**

**CONSENT DECREE**

**I. INTRODUCTION**

1. This Consent Decree ("Consent Decree" or "Decree") is entered into voluntarily by the Delaware Department of Natural Resources and Environmental Control ("DNREC" or "Department") on behalf of the State of Delaware ("State") and New Castle County, a political subdivision of the State of Delaware ("Respondent" or "County"). The Consent Decree concerns the resolution of Respondent's liability for any and all response costs ("Response Costs," hereinafter defined) and natural resource damages ("NRD") under the Delaware Hazardous Substance Cleanup Act, 7 Del. C. Chapter 91 ("HSCA") for the Fox Point Park Site located in Wilmington, Delaware ("facility" or "Site").

**II. JURISDICTION**

2. This Consent Decree is entered into pursuant to the authority vested in the Secretary of the Department by HSCA and the Delaware Regulations Governing Hazardous Substance Cleanup ("Regulations").

3. The Respondent agrees to undertake all actions required by the terms and conditions of this Consent Decree. In any action by the Department to enforce the terms of this Consent Decree, Respondent consents to and agrees not to contest the authority or jurisdiction of the Secretary to enter into or enforce this Decree, and agrees not to contest the validity of this Decree or its terms.

### **III. PARTIES BOUND**

4. This Consent Decree shall apply to and be binding upon DNREC and shall be binding upon the Respondent, its agents, successors, assigns, officers, directors and principals. Respondent is responsible for carrying out all actions required of it by this Consent Decree. The signatories to this Consent Decree certify that they are authorized to execute and legally bind the parties they represent to this Decree.

### **IV. STATEMENT OF PURPOSE**

5. In entering into this Consent Decree, the objectives of DNREC and the Respondent are to set forth and resolve Respondent's liability for Response Costs and NRD for the Site under HSCA by Respondent's payment of an amount set forth in this Consent Decree and/or performance of in-kind services as described below.

6. The in-kind services conducted under this Consent Decree are subject to approval by DNREC and shall provide for the operation of a yard waste drop off site in accordance with (1) the Community Yard Waste Drop Off Site Performance Standards (the "Performance Standards"), a copy of which is attached hereto as Exhibit A, and made an integral and enforceable part of this Consent Decree, and (2) a Site Plan to be prepared by Respondent and submitted to DNREC for its review and approval; once approved by DNREC, the Site Plan shall also become an integral and enforceable part of this Consent Decree. The activities conducted under this Consent Decree shall be conducted in compliance with all applicable federal, state, and local laws.

### **V. FINDINGS OF FACT**

7. The Fox Point Park Site consists of approximately 60 acres of land and lies between Interstate 495 and the Delaware River in Wilmington, Delaware.

8. The Site was created by the filling of subaqueous lands of the Delaware River with industrial waste material, and the application of sewage sludge from the City of Wilmington's wastewater treatment facility on said filled lands.

9. DNREC has determined that the value of the Site when donated to the State in 1990 was greatly in excess of one dollar (\$1.00) and that Respondent should be given a credit for the value of the donated property to be used to offset a portion of Respondent's liability for the Site under HSCA. DNREC has determined that the value of the credit Respondent shall receive for the value of the donated property is sufficient to resolve Respondent's liability for the costs of the investigation and any

remediation of any hazardous substances at the Site, estimated by DNREC to be approximately \$1.1 million dollars ("Response Costs"), but not for NRD. Respondents liability for NRD shall be resolved in accordance with this Consent Decree.

10. DNREC has investigated the release of hazardous substances, and has implemented Final Plans of Remedial Action, for Phases I and II on the Site pursuant to HSCA.

11. The decision by the Department on the remedial action for Phase I of the Site is embodied in the Final Plan of Remedial Action dated December 18, 1992. The decision by the Department on the remedial action for Phase II was executed on December 23, 2005.

12. Respondent, New Castle County, is a political subdivision of the State of Delaware.

13. Respondent was a past owner of the Site.

14. Respondent was notified of its potential liability pursuant to 7 Del. C. § 9107(a) in a letter dated April 7, 1994.

#### **VI. CONCLUSIONS OF LAW AND DETERMINATIONS**

15. The Site is a "facility" as defined in 7 Del. C. Section 9103(10) and is comprised of both Fox Point Park Phase I (DNREC Project Number DE-1001) and Fox Point Park Phase II (DNREC Project Number DE-1011).

16. Wastes and materials disposed of at the Site identified in Paragraph 8 are "hazardous substances" as defined in 7 Del. C. Section 9103(12).

17. The presence of hazardous substances at the Site, or the past, present or potential migration of hazardous substances currently located at or emanating from the Site, constitute actual and/or threatened "releases" as defined in 7 Del. C. Section 9103(21).

18. Respondent is a "person" as defined in 7 Del. C. Section 9103(17).

19. Respondent is a "potentially responsible party" as defined in 7 Del. C. Section 9103(19).

20. Because Respondent's liability for Response Costs is being discharged by the credit granted by DNREC for the conveyance of the Site to the State in the amount of One Dollar, Respondent's total liability at the Site under HSCA is confined to NRD in the amount of \$496,752.00 as set forth in Exhibit B of this Consent Decree (Respondent's "Total Liability").

21. The actions taken by DNREC to investigate and remediate the Site, as stated in this Consent Decree, were necessary to protect the public health or welfare or the environment, and are consistent with 7 Del. C. Chapter 91, and the Regulations.

## **VII. DEFINITIONS**

22. Unless otherwise expressly stated, the definitions provided in 7 Del. C. Chapter 91, and the Regulations shall control the meaning of terms used in this Consent Decree.

## **VIII. SCOPE OF CONSENT DECREE**

23. The parties agree that within five (5) years of the effective date of this Consent Decree, Respondent shall perform the following actions pursuant to this Consent Decree:

- A) Pay to DNREC a total of Four Hundred Ninety Six Thousand Seven Hundred Fifty Two Dollars (\$496,752.00); or
- B) Provide compensation for NRD by the performance of in-kind services in the form of operating a yard waste drop off site, for such period of time as necessary to offset Respondent's Total Liability; or
- C) A combination of direct payment to DNREC and in-kind services as set forth below in Article IX or as otherwise agreed upon.

## **IX. SERVICES TO BE PERFORMED**

24. Should Respondent decide not to provide direct payment to DNREC in the amount of \$496,752.00, Respondent shall provide in-kind services consisting of the operation of a community yard waste drop-off site in accordance with the Performance Standards (the "Services"). The Services shall be performed by Respondent for a period of years sufficient to off-set Respondent's Total Liability. The Services shall be performed at a site chosen by the County and approved in writing by DNREC. The yard waste drop-off site shall include improvements and general site design as shown on a Site Plan to be developed by Respondent and submitted to DNREC for its review and approval.

25. Upon DNREC's receipt of written notice that Respondent completed construction, Respondent shall receive a credit of \$135,000.00 against its Total Liability for the costs of the capital improvements necessary to construct the yard waste recycling facility; for every year that Respondent performs the Services, it shall receive a credit of \$93,220.00, as shown on Exhibit C. If Respondent performs the Services for less than a year in any calendar year, the credit will be pro rated based on the number of days the Services are performed in that calendar year.

26. If Respondent fails, refuses or is unable to continue to perform the Services before it has received sufficient credit to off-set Respondent's Total Liability, it shall not be released from liability for

the amount of Respondent's Total Liability for which it did not receive a credit. Respondent shall begin making payment in accordance with a payment plan to be agreed upon by DNREC and Respondent of this difference as an amount due to DNREC under this Consent Decree (the "Amount Due") within sixty (60) days of a written notice from Respondent that it shall not perform the Services. The payment plan to be agreed upon by Respondent and DNREC shall not require that the payment of the full Amount Due must occur prior to five (5) years from the effective date of this Consent Decree and shall not require more than \$100,000.00 per year in payment unless Respondent agrees otherwise.

#### **X. DISPUTE RESOLUTION**

27. If a dispute arises as to any part of the Consent Decree, the procedures of this Section shall apply.

A) Respondent shall, within twenty-one (21) days of the date a dispute arises, provide the DNREC Project Officer with a written statement setting forth the dispute and the information Respondents are relying upon to support their position, and stating whether Respondents will suspend any work required under this Consent Decree.

B) If the dispute cannot be settled through negotiations with the DNREC Project Officer within (10) ten days, Respondent may submit the written statement under Section 27(A) to the Director of Air and Waste Management ("Director").

C) Following receipt of Respondent's statement under Section 27(A), the Director shall issue an order with respect to the issue(s) in dispute.

D) If the Respondent is not satisfied with the decision of the Director, as to any dispute arising under this Consent Decree, then Respondent may hire, at its own expense, an independent consultant, approved by DNREC, to review all relevant information regarding the dispute, and to make a written recommendation to the Secretary of DNREC reflecting an objective position regarding the issue in dispute. The Secretary may also review any other relevant information or confer with any DNREC staff or other experts before making a decision. The decision of the Secretary shall be considered final unless appealed by the Respondent under 7 Del. C. Chapter 60 or any other appeal right that Respondent may be entitled to under 7 Del. C. Chapter 91.

#### **XI. RESERVATIONS OF RIGHTS AND COVENANT NOT TO SUE**

28. DNREC reserves the right to bring an action against the Respondent under 7 Del. C. Section 9109 for recovery of the Amount Due as defined above.

29. Except as expressly provided in this Consent Decree, each party reserves all rights and defenses it may have. Nothing in this Consent Decree shall affect DNREC's removal authority or DNREC's response or enforcement authorities at the Site.

30. Except as specifically provided in this Section and upon the performance of the Services by the Respondent and/or payment of Respondent's Total Liability or any Amount Due, DNREC covenants not to sue or take administrative action against Respondent pursuant to HSCA for Response Costs or for NRD related to the Site; provided, however, that this covenant not to sue is conditioned upon the satisfactory performance by Respondent of its obligations under this Consent Decree.

31. By entering into this Consent Decree, or by taking any action in accordance with it, Respondent does not admit any of the findings of fact, conclusions of law, determinations or any allegations contained in the Consent Decree, nor does Respondent admit liability for any purpose or admit any issues of law or fact or any responsibility for the alleged release or threat of release of any hazardous substances into the environment. The participation of Respondent in this Consent Decree shall not be admissible against Respondent in any judicial or administrative proceeding, except in an action by DNREC seeking to enforce the terms of this Consent Decree or recover costs incurred by DNREC with respect to this Consent Decree, or actions to which the State of Delaware or DNREC is a party and in which the State or DNREC asserts a claim, defense or argument based upon the terms of this Consent Decree.

## **XII. OTHER CLAIMS**

32. Nothing herein is intended to bar or release any claims, causes of action, or demands in law or equity by or against any person, firm, partnership, or corporation not a signatory to this Consent Decree for any liability it may have arising out of or relating in any way to the generation, storage, treatment, handling, transportation, disposal or release of any hazardous substances at, to, or from the Site.

33. DNREC shall not be held as a party to any contract entered into by Respondent to implement the requirements of this Consent Decree.

## **XIII. CONTRIBUTION PROTECTION**

34. With regard to claims for contribution against Respondent, the parties hereto agree that Respondent is entitled to protection from contribution actions or claims as provided by HSCA for matters addressed in this Consent Decree. The matters addressed in this Consent Decree include, without limitations, any remedy taken and response costs incurred or to be incurred by DNREC or any other person as to the Site.

## **XIV. OTHER APPLICABLE LAWS**

35. All actions required to be taken pursuant to this Consent Decree shall be undertaken in accordance with the requirements of all applicable local, state and federal laws and regulations. If there is a conflict in the application of federal, state or local laws or regulations, the most stringent of the conflicting provisions shall apply.

#### **XV. ENFORCEABILITY**

36. The terms of this Consent Decree shall be legally enforceable by any party to this Consent Decree in a court of appropriate jurisdiction.

#### **XVI. AMENDMENT OF CONSENT DECREE**

37. This Consent Decree may be amended by mutual agreement of DNREC and Respondent. Amendments shall be in writing and shall be effective when signed by DNREC. DNREC Project Managers do not have the authority to sign amendments to the Consent Decree.

38. No informal advice, guidance, suggestions, or comments by DNREC regarding reports, plans, specifications, schedules, and any other writing submitted by the Respondent will be construed as relieving the Respondent of its obligation to obtain such formal approval as may be required by this Consent Decree. Any deliverables, plans, technical memoranda, reports (other than progress reports), specifications, schedules and attachments required by this Consent Decree are, upon approval by DNREC, incorporated into this Decree.

#### **XVII. SUCCESSORS**

39. This Consent Decree shall be binding upon Respondent, its successors and assigns, and upon DNREC, its successors and assigns.

#### **XVIII. TERMINATION**

40. The provisions of this Consent Decree shall be deemed satisfied and terminated upon receipt by Respondent of written notice from the DNREC Secretary that Respondent has demonstrated, to the satisfaction of DNREC, that all the terms of this Consent Decree have been completed. Upon satisfactory completion of the terms of this Consent Decree, DNREC shall file with the Superior Court a Stipulation of Dismissal of this Decree incorporating any Certificate of Completion issued by DNREC.

#### **XIX. COUNTERPARTS**

41. This Consent Decree may be executed in multiple counterparts, each of which shall be deemed an original, but which together shall constitute one and the same instrument.

#### **XX. EFFECTIVE DATE**


42. This Consent Decree is effective on the date that it is entered by the Superior Court.

**\*\*Signature Page Follows\*\***

**RSK09005**



DEPARTMENT OF NATURAL RESOURCES AND  
ENVIRONMENTAL CONTROL

BY:   
David S. Small, Acting Secretary

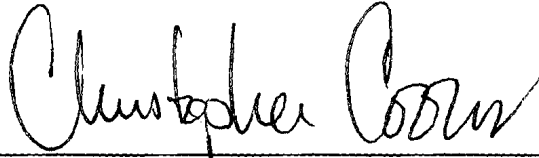
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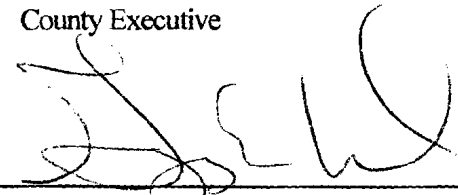
BY: \_\_\_\_\_  
Robert. S. Kuehl, Deputy Attorney General  
Delaware Department of Justice

DATE: \_\_\_\_\_

NEW CASTLE COUNTY

BY:   
Christopher A. Coons  
County Executive

DATE: 4/8/09

BY:   
Gregg E. Wilson  
County Attorney

DATE: 4/13/09

DEPARTMENT OF NATURAL RESOURCES AND  
ENVIRONMENTAL CONTROL

BY: \_\_\_\_\_  
David S. Small, Acting Secretary

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County Attorney

DATE: 4/13/09

## **EXHIBIT A**

### **Community Yard Waste Drop Off Site Performance Standards**

In order to satisfy the requirements of the Consent Decree entered into between Delaware Department of Natural Resources and Environmental Control ("DNREC") and New Castle County ("County"), Civil Action No. \_\_\_\_\_ (the "Consent Decree"), the County agrees comply with the following general performance standards for the operation of a community yard waste drop off site ("Drop Off Site").

- The Drop Off Site shall be operated so as to allow the general public access and use a minimum of thirty hours a week, barring exigent circumstances.
- The Drop Off Site site shall generally be kept free of extraneous debris (other than yard waste debris) and managed such that unacceptable materials are largely precluded from entering the Drop Off Site to the extent possible and any unacceptable materials that do enter the Drop Off Site are removed and properly disposed of or recycled, as the County deems appropriate. Prior to the commencement of operations at the Drop Off Site, the County will develop a list of materials it deems unacceptable and such list will be subject to review and approval by DNREC.
- Delivery and storage of yard waste at the Drop Off Site and the subsequent accumulation of mulch from the grinding of the yard waste shall be conducted such that large piles of un-ground yard waste and/or accumulated mulch are avoided. "Large piles" shall be defined as piles generally no higher or wider than the standards for piles set by DNREC and maintained in other DNREC community yard waste sites.
- The site shall be fenced and/or buffered from surrounding residential properties, as shown in the attached drawing.
- Generated yard waste and mulch piles shall be inspected at least once a day on a day that the site is open to the public and the piles shall be maintained in such a manner that spontaneously generated fires are avoided to the extent possible.
- The mulch produced from the yard waste may be used by the County for its own use or by the general public, as the County deems appropriate. The mulch shall be of a quality that is functional for the general public or the County.
- The site shall be designed to accommodate the type and volume of traffic and the necessary maintenance equipment that can reasonably be expected to use

the site during peak periods of yard waste activity such that a smooth flow of traffic in and out of the site is generally permitted. County shall apply for and receive DelDOT approval for any entrance permit or traffic flow pattern, if applicable. The Site Plan attached hereto has been approved by DNREC. The County shall receive written approval from DNREC for any substantial changes to the site design.

- DNREC recognizes that yard waste is a compostable material and can be managed to produce quality compost. In the event that the County desires to produce compost from the yard waste, it will be necessary for the County to obtain the required permits and approvals from state and local government, including DNREC, to conduct composting of the yard waste.
- In order to educate the public about the use and availability of the Drop Off Site, it is necessary to maintain a yard waste website and respond to public inquiries via telephone. The County must maintain a website similar to the one DNREC has prepared regarding the Drop Off Site and respond to telephone inquiries from the general public about Drop Off Site usage, location availability of mulch, hours of operation, etc. The County shall submit a plan for its website to DNREC within thirty (30) days of the effective date of the Consent Decree. DNREC shall provide comments or approval no later than sixty (60) days after the receipt of such website plan.

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WINTER IN DOVER | PHOTO BY MIKE MANAPPE

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**What is yard waste?**

It's plant material that comes from lawn maintenance and other gardening and landscaping activities. This includes:

- Grass
- Leaves
- Prunings
- Brush and shrubs
- Garden materials
- Christmas trees
- Tree limbs up to 4" in diameter

**Quick links**

[The New Castle County Yard Waste ban explained](#)

[Yard waste collection options](#)

[Yard waste drop-off options](#)

[DNREC community yard waste demonstration sites](#)

[Homeowner yard waste options](#)

[Composting information](#)

[Senate Joint Resolution 2/Senate Amendment 1](#)

[Senate Joint Resolution 2 Final Report](#)

[Cherry Island Landfill permit condition](#)

[DNREC yard waste presentation schedule](#)

[DNREC yard waste presentation \(Power Point\)](#)

[Yard waste management committee](#)

- [Yard waste management consensus points](#)

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**For more information:** contact the Solid & Hazardous Waste Management Branch at (302) 739-9403.



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## EXHIBIT B

### Fox Point NRDA Cash Out Calculation

#### ASSUMPTIONS

Estimated PCBs to river: **25 lb** (SIRB calculation)

Ratio of PCBs in fish to PCBs discharged to water **0.05% = 0.0005** (per Rick Greene)

Fish advisory criterion (based on human consumption) 24 ppb in filets, equivalent to **48 ppb in whole body (Delaware Fish advisory estimated for whole body)**

Fish biomass produced per acre of marsh per year: **1,213 lbs of fish produced /acre of restored tidal wetland/year (PSE&G Estuary Enhancement Program)**

Discounted Service Acre Years (DSAY's) for a typical Delaware tidal wetland restoration project with a 50 year lifespan and enhance from 20to 60% of services in first 10 years and reaches

90 % (full potential) by year 20 = **12.7 service acre years (NOAA)**

Cost to restore freshwater tidal marsh in New Castle County: **\$146,968/acre with 25% contingency (Delaware Division of Fish and Wildlife)**

New Castle County's share of PCB related damages = **20% = 0.2 (SIRB)**

Therefore:

Amount of PCBs in fish tissue =  $25 \text{ lb} * 0.0005 = 0.0125 \text{ lb}$

Fish biomass contaminated to or above advisory level =  $0.0125 \text{ lb} / 0.000000048 = 260,416.67 \text{ lb}$

Acres of tidal marsh required to replace this amount of fish biomass in one year =  $260416.67 \text{ lb} / (1213 \text{ lb/acre}) = 214.69 \text{ acres}$

Number of acres wetland need to replace assuming 12.7 DSAY's/ acre of wetland project 214.69 acres/ 12.7 DSAY's = **16.9 acres**

New Castle County's share =  $16.9 * 20\% = 3.38 \text{ acres}$

Cash cost of restoration =  $3.38 \text{ acres} * \$146,968/\text{acre} = \$496,752$

Therefore, we propose to settle this natural resource damage liability for **\$496,752**.

## **EXHIBIT C**

### **Yard Waste Site Anticipated Annual Operating Costs**

#### **Labor**

Maintenance crew visiting site once per week for 4 hours	\$31,200
Crew consists of: Crew Chief, MEO II, M&C, M&C	
Tasks are for straightening up the site and trash removal	
Loader and operator for 4 hours every other week	\$ 7,020
Rental of tub grinder and crew for ten grindings per year	<u>\$50,000</u>
Sub-Total per year.....	<b>\$88,220</b>

#### **Miscellaneous costs**

Illegal dumping removal & disposal	\$ 5,000
Sub-Total per year.....	<b>\$ 5,000</b>
Total.....	<b>\$ 93,220</b>

**Site Construction Capital Cost..... \$135,000**